

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

**UNITED STATES COAST GUARD**

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UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD

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vs.

MERCHANT MARINER'S DOCUMENT  
NO. Z-884000  
Issued to:  
Faustino S. PEREIRA, Appellant

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:  
: DECISION OF THE  
:  
: VICE COMMANDANT  
:  
: ON APPEAL  
:  
: NO. 2567  
:  
:  
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This appeal has been taken in accordance with 46 U.S.C.

§ 7702 and 46 C.F.R. § 5.701.

By order dated August 12, 1993, an Administrative Law Judge (ALJ) of the United States Coast Guard at Norfolk, Virginia suspended Appellant's document outright for six months, with a further six months' suspension on twelve months probation, upon finding proved a charge of misconduct. The sole specification supporting the charge alleged that Appellant, while serving as QMED-Electrician aboard M/V PFC WILLIAM B. BAUGH, O.N. 674269, under authority of his document, on September 2, 1992, while said vessel was at Diego Garcia, British Indian Ocean Territory (B.I.O.T.), wrongfully submitted falsified work reports for fan tests.

A hearing was held at Norfolk, Virginia on July 28, 1993. Appellant did not appear at the hearing, nor was he otherwise

represented during the proceedings. After inquiry on the record as to the facts of service of the charge and notice of the hearing, the ALJ permitted the hearing to proceed in absentia, as provided in 46 C.F.R. § 5.515.

The ALJ denied the charge and specification on behalf of the Appellant as provided in 46 C.F.R. § 5.527. The Investigating Officer (IO) introduced into evidence ten exhibits and the testimony of three witnesses. A letter from Appellant seeking to change the date and location of the hearing was introduced as an exhibit for Appellant. The ALJ had previously denied Appellant's request by letter. TR at 20, ALJ Ex. I.

At the end of the hearing, the ALJ rendered an oral decision in which he found that the charge and specification were proved. Appellant filed notice of appeal on August 27, 1993, apparently based on a telephone call through which he learned of the ALJ's oral decision. The ALJ's written decision and order were entered on September 15, 1993, and were served on Appellant some time prior to September 24, 1993. Appellant perfected his appeal by filing one letter on or about September 25, 1993, and a second letter, dated October 18, 1993, expanding upon the first letter. As both were received within the filing requirements of 46 C.F.R. § 5.703, this appeal is properly before me.

Appearance: Appellant pro se.

#### FINDINGS OF FACT

On September 2, 1992, Appellant was serving as QMED/ Electrician aboard the M/V PFC WILLIAM B. BAUGH, O.N. 674269,

while the vessel was at Diego Garcia, B.I.O.T. The M/V PFC WILLIAM B. BAUGH is an inspected U.S. freight ship of 38,412 gross tons. Appellant was acting under the authority of his Coast Guard issued merchant mariner's document.

In the course of his duties aboard the M/V PFC WILLIAM B. BAUGH, Appellant was directed to inspect seven vent and exhaust fans located aboard the vessel. Maintaining the fans is part of the regular preventive maintenance schedule aboard the vessel. The seven inspection reports Appellant submitted to the Chief Engineer were falsified in that Appellant had not performed the maintenance that the reports claimed. The Chief Engineer discovered that the reports were in error, and the following day Appellant was discharged for the falsification.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ. Appellant's brief on appeal comprises two letters pertaining to the following:

- I. Appellant makes assertions concerning the circumstances surrounding the offense of which he was charged.
- II. Appellant claims he was denied due process because he had no opportunity to attend the hearing or to represent himself at the hearing.
- III. Appellant re-urges his request for a change of venue.

## OPINION

### I.

Before addressing the merits of this appeal, two preliminary matters must be addressed.

The first concerns Appellant's attachment of exhibits to his appeal brief that were not presented at the hearing. The reverse of Appellant's letter of September 25, 1993 appears to be a photocopy of a portion of the timetable of the S/S SAM HOUSTON for Voyage No. 51; there is also a copy of his letter of August 27, 1993 addressed to the ALJ, Norfolk, Virginia, photocopies of what appear to be various Seafarers' International Union papers dating from about 1949, and photocopies of 3 of Appellant's discharges dated September 3, 1992, May 5, 1993, and August 16, 1993. With his letter of October 18, 1993, Appellant attached a copy of his September 25, 1993, letter and further copies of his discharges.

These documents were not offered in evidence at the hearing, nor even marked for identification. The regulations governing appeals in these proceedings state, in pertinent part, that the hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal. 46 C.F.R.

§ 5.701. Therefore, the items above are not part of the hearing record and will not be considered on appeal.

The second preliminary matter in this appeal concerns the many statements in Appellant's letters which describe the circumstances of his dismissal from the M/V PFC WILLIAM B. BAUGH. Inasmuch as Appellant appears pro se, I will give what consideration is legally possible to his submissions. However,

Appellant's statements are not part of the record and thus cannot be considered as evidence. 46 C.F.R. § 5.701. I shall consider them, therefore, as general argument in support of his case. However, because Appellant's statements are without support in the record, I must find them unpersuasive in light of the ALJ's findings, which have extensive support in the record. Appeal Decision 2279 (LEWIS).

## II.

Beyond the assertions discussed above, Appellant contends that his rights of due process were violated in that he had no opportunity to attend the hearing or to represent himself. The appeal does not make clear in what way Appellant was denied these opportunities. Giving Appellant the benefit of the doubt, therefore, I deem that his appeal comprises a claim of inadequate notice, denial of opportunity to be heard, and error or abuse of discretion by the ALJ in denying Appellant's request for change of date and venue. On all three points, I disagree.

## A.

I first consider the issue of notice. Appellant was served with the original charge and specification by mail on May 24, 1993. TR at 10; I.O. Ex. 1, 4. He acknowledged service by return receipt. Id. Furthermore, Appellant wrote in response to the charge sheet, asking for a change of date and venue. TR at 15; Resp. Ex. A. In that letter, Appellant invited a response to his home address, stating that any mail sent to his home address (to which the original charge sheet had been sent) would be forwarded to him. Id. Appellant then sailed aboard the S/S SAM HOUSTON on May 30, 1993. TR at 17; I.O. Ex. 3.

The ALJ denied Appellant's request for change of date and venue by order dated June 15, 1993 and obtained a return receipt through the mail. ALJ Ex. I. The ALJ's denial order restated the scheduled date and time of the hearing. *Id.* Clearly Appellant knew the time, place, and nature of the hearing: there was no flaw in the notice he received.

B.

I next consider whether Appellant was denied the opportunity to be heard.

In Appeal Decision 1785 (ADDISON), a similar situation existed. In that case, the Appellant had notice of the time and place of the hearing when he chose to sign onto the crew of a ship. Similarly, the Appellant in ADDISON applied for a change in the date of the hearing, which was not granted. When the hearing was held without Addison's presence, he claimed on appeal that he was deprived of the opportunity to defend himself.

Here, as there, I reject the argument. "A seaman may choose to sail during the pendency of a hearing if he wishes, but when he has been given proper notice of proceedings he cannot complain that an obligation later undertaken prevented him from appearing in his own behalf."

Appeal Decision 1785 (ADDISON); see also Appeal Decision 1917 (RAY). The decision whether to attend the hearing lay with Appellant. Having elected to sail rather than to appear, he is estopped to appeal the necessary consequence of his choice. This basis of appeal avails Appellant nothing.

C.

I next consider the date and venue changes that Appellant requested. 46 C.F.R. § 5.509 places the decision to change the

time and place of the hearing within the discretion of the ALJ. The ALJ's decision will not be changed unless it is clearly erroneous or is an abuse of his discretion. Appeal Decisions 2545 (JARDIN), 2424 (CAVANAUGH), 2423 (WESSELS).

Appellant's written request of May 29, 1993, to change the date and venue of the hearing was read into the record at the hearing. TR at 11-15. In addition to a number of statements about circumstances aboard the M/V PFC WILLIAM B. BAUGH, the letter stated that Appellant had travelled to Piney Point, Maryland, to attend a union school, that he was then on the

S/S SAM HOUSTON, that it would be sailing foreign with an uncertain return date, and that he requested a delay until its return. He also requested a venue change to New York because he resided there.

The governing regulations mention two factors for the ALJ to consider when weighing requests to change the date and time of a hearing: the respondent's rights to a fair hearing, and the availability of witnesses. 46 C.F.R. § 5.509; see also Appeal Decisions 2391 (STUMES), 2165 (BOLDS & BROOKS). The Administrative Procedure Act (APA) states that "In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties . . . ." 5 U.S.C.

§ 554(b).

The burden is on the Appellant, as the moving party, to justify his request for a change of venue. BOLDS & BROOKS, supra. Appellant's only stated reason for a change of venue was that he resided in New York. It is well settled in these proceedings that the mere fact of residence elsewhere by the

party requesting a change in venue is not proper ground. Appeal Decisions 2165 (BOLD & BROOKS), 2143 (FOSTER, SEBASTIAN, & CAMERON), 1943 (FLEMMING). Mere inconvenience due to travel is not a reason to change venue. Appeal Decision 2237 (STRELIC).

Other factors apparent from the record in this case are that the charges were investigated by Marine Safety Office Hampton Roads, Virginia (MSO), and the case against Appellant's merchant mariner's document was prepared by that office. The MSO also selected the witnesses it desired and arranged for them to testify. While these factors are not such as to prevent the hearing taking place elsewhere, they manifest the MSO's interest in seeing the case through to conclusion.

More importantly, the record suggests that the three government witnesses would likely not have been available at the later date that Appellant requested. The possibility that live testimony may later be unavailable is a factor weighing against changing the date of a hearing. See, Appeal Decisions 2389 (COLLA), 2317 (KONTOS).

The ALJ considered Appellant's residence as well as the other factors before denying the requested change of venue and date. TR at 17-18. In forming his decision, the ALJ explicitly acknowledged the APA provision (cited above). TR at 17. There is nothing in the record to suggest that the ALJ abused his discretion in denying the requested change, nor does Appellant point to any evidence of such an abuse. This assertion is without merit.



### III

Finally, Appellant re-urges his request for a change of venue. This is not a proper basis of appeal. 46 C.F.R. § 5.701 limits what may be considered on appeal to matters not waived during the hearing, clear error in the record, and jurisdictional issues. The ALJ, rather than the Commandant, is specifically accorded the discretion to change the place and time of the hearing. 46 C.F.R. § 5.509. As discussed supra, there is no evidence of error or abuse of discretion in the ALJ's decision on the record. Consequently, Appellant's request is untimely and misdirected, and it will not be heard on appeal.

### CONCLUSION

The findings and conclusions of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable law and regulations. The order is not unduly severe.

### ORDER

The findings and order of the Administrative Law Judge are AFFIRMED.

A. E. HENN

Vice Admiral, U.S. Coast Guard

Vice Commandant

Signed at Washington, D.C., this 20th day of June, 1995.

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